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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

v.

PULLMAN-STANDARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

This appeal and petition do not, as respondent suggests, concern disputed issues of fact. The courts below candidly acknowledged that the Pullman-Standard's seniority system was administered in an expressly and avowedly racial manner. For

decades before 1965, and for a number of years thereafter, promotions were made to the "senior white" or "senior black," according to the racial categorization of each vacancy. Both courts below also agreed that a number of previously integrated departments had been separated into all-white and all-black departments for avowedly racial reasons. Respondent's Brief in Opposition, although raising a variety of peripheral factual issues, does not dispute these critical findings. Respondent does deny that its termination of on-the-job training for senior bidders was racially motivated (Br. Opp. 11-12), but the district and circuit courts held otherwise. (Pet. 27-28).

What is at issue here, as in the circuit court, is the legal significance of these avowedly discriminatory seniority practices. Respondent prevailed below on

a contention of law -- that the types of intentional racial discrimination which permeated the Pullman-Standard seniority system were, as a matter of law, legally irrelevant. That contention turns not on any disputes of historical fact, but on the interpretation of section 703(h) of Title VII and the meaning of Teamsters v. United States, 431 U.S. 324 (1977). The circuit court understood that the appeal before it raised essentially legal issues. (See Pet. App. 167a); it upheld the seniority system only because it had resolved those legal issues in respondents' favor. Respondent's contention that there was insufficient evidence to prove the seniority system non-bona fide is in reality a contention that the courts below properly held legally irrelevant most of the evidence of racially motivated seniority practices.

Respondent argues repeatedly that the merit of this petition is controlled by the Court's June, 1989 decision in Lorance v. A.T. & T. Technologies, Inc., 104 L.Ed.2d 961 (1989). (Br. Opp. 3, 9, 13, 15-16, 17). We agree that this case raises a number of important issues regarding the meaning of Lorance, but urge that the ramifications of Lorance are far from clear, and that certiorari should be granted to address the questions posed by that decision.

Respondent's most important legal contention is that under Lorance a seniority system adopted prior to 1965 for avowedly racially discriminatory purposes would, nonetheless, be bona fide as a matter of law. (R.Br. 17-18). Respondent argues that, even though the Pullman-Standard seniority practices may have been structured and operated for the express

purpose of discriminating against blacks, such an invidious intent is irrelevant because the system and practices were established prior to 1965, and are thus "time-barred." (R. Br. 17). Although the circuit court opinion in this case pre-dates Lorance, respondent's argument is a plausible construction of the decision below. Whether Lorance in fact declares bona fide all pre-Act racially motivated seniority systems is a legal issue of great importance which this Court should grant certiorari to resolve.

Prior to Lorance the decisions of this Court left no doubt that a racially-motivated pre-Act seniority system was, by definition, not bona fide. Teamsters v. United States, 431 U.S. 324 (1977), held that Congress added section 703(h) to the 1964 Civil Rights Act in order to protect then existing seniority systems, provided

that they were bona fide. 431 U.S. at 343-56. Teamsters upheld the longstanding seniority system in that case because, in part, it did not "have its genesis in racial discrimination." 431 U.S. at 356. In California Brewers Assn. v. Bryant, 444 U.S. 598 (1980), the Court directed the lower courts to decide whether a seniority system established prior to 1960 was or was not bona fide. 444 U.S. at 602, 611. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court addressed an issue which it thought had been left unresolved by Teamsters, whether section 703(h) protects post-Act bona fide seniority systems. The majority concluded that "§ 703(h) makes no distinction between pre-Act and post-Act seniority systems," 456 U.S. at 71, which could be invalidated only if there was "actual intent to discriminate." 456 U.S. at 65.

The Court held that a plaintiff could defeat the defense provided by section 703(h) if he or she could prove that a seniority system, no matter how old, was invidiously motivated.[1] When the instant case was before this Court in 1982, the Court indicated that the bona fides of the seniority system would turn, at least in part, on "the purpose of ... creating ... the seniority system," notwithstanding the fact that the system, as respondent now emphasizes, had been created long before the adoption of Title VII. Pullman-Standard v. Swint 456 U.S. 273, 292 n. 23 (1982).

This entire line of cases, as respondent observes, has been called into

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[1] 456 U.S. at 70 ("employees who seek redress under Title VII more that 180 days after the adoption of a seniority system ... would have to prove the system was intentionally discriminatory") (footnote omitted).

question by Lorance. The defendants in Lorance expressly urged this Court to hold that a seniority system created prior to 1965 for the purpose of racial discrimination is, as a matter of law, bona fide under section 703(h). (Pet. 32-33 n. 18). The majority opinion in Lorance, although stopping short of such a holding, undeniably contains language which lends some support to such a major change in the interpretation of section 703(h).[2]

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[2] E.g. 104 L.Ed.2d 973.

> "At least as concerns seniority plans, we have regarded subsection (h) ... as a provision that itself delineates which employment practices are illegal and thereby prohibited and which are not .... Thus petitioners' claim depends on proof of intentionally discriminatory adoption of the system, which occurred outside the limitations period."

104 L.Ed.2d at 975:

> "[A] facially neutral system, if it

But Lorance held only that employees must act promptly if they wish to challenge post-Act alterations in seniority rules; it did not suggest that pre-Act seniority rules could never be challenged at all. Although respondent characterizes our challenge to the Pullman seniority rules as "untimely," on respondent's view of the law no timely Title VII charge could ever be filed against a pre-Act seniority system, since Title VII itself did not exist at the time when the racially motivated pre-Act practices and rules were adopted.

We do not think that the Court in Lorance in fact intended to overrule

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is adopted with unlawful discriminatory motive, can be challenged within the prescribed period after adoption. But allowing a facially neutral system to be challenged ... many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect."

Teamsters, Patterson, California Brewers, and the Court's prior decision in Swint. In Lorance, unlike Teamsters and the instant case, there was no claim that the disputed seniority practice perpetuated the effects of past discrimination. The claim in Lorance was more closely analogous to the issue in Delaware State College v. Ricks, 449 U.S. 250 (1980), on which the majority relied, than to the circumstances in Teamsters. As the Court observed in Teamsters, section 703(h) was adopted in 1964 primarily to protect then existing seniority systems, provided they were bona fide. Congress clearly intended this proviso to distinguish between then existing systems which were and were not bona fide. But if evidence of pre-Act invidious motives were irrelevant, then all the seniority systems in existence in 1964 would have been bona fide.

Although we think respondent's construction of Lorance is ultimately unsound, the passages in Lorance on which respondent relies undeniably throw into question virtually every pending case challenging the bona fides of a seniority system. In almost all of those cases the alleged invidious purpose concerned the creation of a seniority system years before Title VII was ever adopted. If such a pre-Act invidious motivation is indeed irrelevant to the bona fides of a seniority system, Teamsters, Patterson, California Brewers and this Court's previous decision in Swint would all now be bad law. The circumstances of this case, as respondent itself suggests, squarely present that issue, and certiorari should be granted to resolve it.

This case also involves seniority practices adopted or maintained for discriminatory purposes after the enactment of Title VII. Here too, there is a disagreement about the meaning of Lorance. Both before and for some time after the adoption of Title VII the actual seniority rule at the plant was to promote the "senior white" or "senior black," according to the racial designation of each vacancy. The Eleventh Circuit thought this largely irrelevant to the bona fides of the seniority system because the nominal written seniority rules contained no such racial standard. Lorance makes a sharp distinction between a "facially neutral" seniority system and "a facially discriminatory system." 104 L.Ed.2d at 975 n. 5. But the distinction in Lorance turns, not as in the Eleventh Circuit on nominal written rules, but on

actual seniority practices; Lorance makes clear that a seniority system would be unlawful under Title VII if it were "operated in an intentionally discriminatory manner." 104 L.Ed.2d at 971. (Emphasis added). In this regard the decision of the Eleventh Circuit is squarely inconsistent with the decision in Lorance.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Eleventh Circuit. In the alternative, it might be

appropriate to vacate and remand the decision of the Court of Appeals for reconsideration in light of Lorance.

Respectfully submitted,

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